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ENVIRONMENT AND DEVELOPMENT: ACCOUNTABILITY THROUGH INTERNATIONAL LAW

Alan E. Boyle*

I. Development as an Environmental Issue

"Environment and development are not separate challenges; they are inexorably linked. Development cannot subsist upon a deteriorating environmental resource base; the environment cannot be protected when growth leaves out of account the costs of environmental destruction. These problems cannot be treated separately by fragmented institutions and policies."¹

As this quotation from the report of the World Commission on Environment and Development clearly indicates, development is inevitably an environmental issue. The Commission identified population growth, food security, protection of species and ecosystems, energy use, industrial production and urban life as the major environmental challenges facing international policy makers. These problems have an impact at three levels: national, bilateral and global. They may contribute to pollution, to the depletion of natural resources and ecosystems, and to the degradation of common spaces including the atmosphere, the oceans and Antarctica.²

Because these problems affect other states and the global environment, the traditional concept of territorial sovereignty within which states have been free to pursue their own national development policies, no longer meets contemporary needs.³ Principle 21 of the 1972 Stockholm Declaration on the Human Environment for this reason reflects a compromise between the competing claims of development and environmental protection:

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1. World Commission on Environment and Development, *Our Common Future* (Oxford, 1987), p. 37.

2. See generally L.K. Caldwell, *International Environmental Policy* (Durham N.C., 1984).

3. See *Island of Palmas Case* (1928) 2 R.I.A.A. 829.

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction and control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.⁴

This compromise, aimed particularly at protecting the interests of developing states, while reiterating their environmental obligations, has been maintained in the 1982 Law of the Sea Convention, in the 1985 Vienna Convention for the Protection of the Ozone Layer and its later protocol, and in regional arrangements for the control of land-based and airborne pollution.

Something of a double standard has thus emerged in the formulation of environmental pollution norms. It is clear both that much of the detailed regulation of pollution effected by international agreement is mainly accepted only in the northern hemisphere developed economies, and that developmental goals have inhibited progress on issues such as ozone depletion, deforestation, biological diversity and wildlife conservation in the underdeveloped world.⁵

Nevertheless, certain basic principles of environmental protection appear to be widely accepted, even in the developing world. The principle of sustainable development, adopted by U.N.E.P. and articulated by the World Commission on Environment and Development, now informs international conservation policy and has

4. Report on the U.N. Conference on the Human Environment, Stockholm, 1972, U.N. Doc. A/CONF/48/14/RE. 1; L.B. Sohn, "The Stockholm Declaration on the Human Environment," (1973) 14 *Harvard International Law Journal* 423.

5. J.W. Kindt, "The Effect of Claims by Developing Countries on LOS International Marine Pollution Negotiations" (1979) 20 *Virginia Journal of International Law* 313; A.E. Boyle, Regional Pollution Agreements etc, in, W.E. Butler (ed) *Law of the Sea and International Shipping* (Dobbs Ferry, 1985); C. Okidi, "Prospects for Co-operation Among Developing Countries in Legal Aspects of Control of Transboundary Air Pollution," in, C. Flintermann et al., *Transboundary Air Pollution* (Dordrecht, 1986) and see in particular Stockholm Declaration, Principles 8-12, 23; U.N.G.A. Res. 3002 (XXVII); 1987 Montreal Protocol to the Vienna Convention for the Protection of the Ozone Layer.

begun to be reflected in international law governing the exploitation of natural resources.⁶

The Stockholm Declaration of 1972 represents a statement of international policy regarding environmental protection goals, including controls on the discharge of toxic substances, the prevention of marine pollution and the rational management of resources. Principle 21 of the Declaration is generally regarded as codifying an obligation of customary international law to protect other states and the global environment from pollution and environmental harm.⁷ Since 1972, the primary obligations of states in matters such as the control of marine pollution, the conservation of migratory animals, and the management of transboundary environmental risks have been clarified by international agreement, state practice, and the declarations of international organisations.⁸

In achieving these policy objectives a variety of approaches are appropriate. In some cases economic policies may be useful, such as the "polluter pay" principles favoured by O.E.C.D. as a means of internalising environmental costs,⁹ or controls on trade, such as those used to protect endangered species or the ozone layer.¹⁰ The use of international institutions to promote environmental goals is a second possibility. Here the examples range from the introduction of environmental assessment criteria by the World Bank and other

6. U.N.G.A. Res. 35/74 (1980); I.U.C.N. World Charter for Nature, 1982, endorsed by U.N.E.P. Resolution 14/14 (1982) and U.N.G.A. Res. 37/7 (1982); World Commission on Environment and Development, Legal Principles, *Our Common Future*, Annex I, and Ch. 2. See also *Anglo-Icelandic Fisheries Case* (1974) I.C.J. Reports 3.

7. See U.S. and Canadian Comments in U.N. Doc. A/CONF/48/14/Rev.1 at 64-66. U.N.G.A. Res. 2996 (1972) asserts that Principles 21 and 22 of the Stockholm Declaration "Lay down the basic rules governing the matter." 112 states voted for this resolution, none opposed.

8. See, e.g. J. Schneider, *World Public Order of the Environment* (London, 1973); A.C. Kiss, "The International Protection of the Environment," in R. MacDonald and D. Johnston (eds.), *The Structure and Process of International Law* (The Hague, 1983); P.W. Birnie, "Development of International Environmental Law" (1977) 3 *British Journal of International Studies* 169.

9. O.E.C.D. Recommendations, C(72) 128 (1972); C(74) 223 (1974) and the "Declaration on Environmental Resources for the Future," adopted by member governments, 20 June, 1985, reprinted in O.E.C.D., *O.E.C.D. and the Environment* (Paris, 1986), and see O.E.C.D., *Economic Instruments for Environmental Protection* (Paris, 1989), at pp. 27-30.

10. See, e.g., 1973 Convention on International Trade in Endangered Species; 1987 Montreal Protocol to the Vienna Convention for the Protection of the Ozone Layer, Art. 4.

development agencies.¹¹ The growing involvement of U.N. Specialised Agencies such as I.M.O. or I.A.E.A. in pollution control,¹² to the creation of UNEP as a global organisation dedicated to coordinating and developing international environmental policy.¹³

A third approach involves the use of national, regional and international legal systems to bring about the implementation of global environmental policy. Although the utility of law as an instrument of international policy should not be exaggerated in this context, much attention has now been devoted to the development of international environmental law and the supporting structures of the international legal system.¹⁴ The progress that has been made in these respects ensures that the international legal system now provides a variety of mechanisms for holding states or those under their jurisdiction accountable for the implementation of environmental obligations. It is to an examination of these mechanisms that the remainder of this paper is devoted.

II. Accountability and the Implementation of International Environmental Law

There are three main ways in which international law provides for the implementation of environmental obligations:

- through inter-state claims based on the principle of state responsibility,
- through national law, using in particular the principle of equal access to national remedies and nondiscrimination, transboundary

11. P.R. Muldoon, "The International Law of Eco-Development: Emerging Norms for Development Assistance Agencies," 22 *Texas Int. Law Journal* 1 (1987).

12. *See below*.

13. *See* U.N.G.A. Res. 2997 (1972); U.N.E.P. Nairobi Declaration, 1982.

14. *See* U.N.E.P. Montevideo Programme for the Development of Environmental Law, 1981; W.C.E.D., *Legal Principles and Recommendations*, in R. Munro and J. Lammers, *Environmental Protection and Sustainable Development* (London, 1986); 1982 U.N. Convention on the Law of the Sea, Part XII; O.E.C.D., "Principles Concerning Transfrontier Pollution," Res C(74) 224 (1974); I.L.C. Reports on "International Watercourses" and "Liability of States for Injurious Consequences of Acts not Prohibited by International Law" in successive Yearbooks of the Commission from 1973 onwards.

civil liability schemes, extraterritorial criminal jurisdiction and the individual right to a decent environment,

- through international institutions, using methods of inspection, standard setting, reporting and review procedures to supervise and ensure compliance with treaty obligations concerning pollution and resource conservation.

A. Inter-State Claims: State Responsibility

State responsibility is the principle by which states may be held accountable in international claims for a breach of their obligations.¹⁵ This may involve proceedings before international arbitral tribunals or the International Court of Justice, such as the well known *Trail Smelter Arbitration*¹⁶ the *Lac Lanoux Arbitration*¹⁷ and the *Nuclear Tests Cases*.¹⁸ Alternatively, states may press claims diplomatically and negotiate settlements.¹⁹

While potentially effective, this process has a number of drawbacks. Firstly, cases must be taken up by states; the provision of diplomatic protection is discretionary and the injured victim has no control over the proceedings or over any settlement that results.²⁰ Moreover, the jurisdiction of international tribunals is rarely compulsory; without agreement to resort to third party settlement, claims can only be pressed by negotiation.²¹

Secondly, the applicable principles of customary international law are those which place obligations of conduct on states; they are not

15. I.L.C., Draft Articles on State Responsibility, Part 1, (1980) 2 *Yearbook of the I.L.C.*, Pt. II, p. 30, Art. 3.

16. (1939) 33 *American Journal of International Law* 182 and (1941) 35 *American Journal of International Law* 684.

17. (1957) XII Reports of International Arbitration Awards 281.

18. (1974) I.C.J. Reports 253.

19. E.g., Claim for Damage Caused by Cosmos 954, 1979 (U.S.S.R. v. Canada).

20. *Barcelona Traction Case* (1970) I.C.J. Reports 4.

21. Statute of the I.C.J., Art. 36.

directly concerned with the conduct of individual polluters.²² Although it is beyond question that international law requires states to refrain from causing serious damage to other states or the environment,²³ and to conserve natural resources shared with other states,²⁴ the exact contours of these customary obligations are unsettled. In pollution cases, it is unclear whether the obligation is only one of diligent control of sources of harm, or whether states are strictly responsible for the fact of harm, regardless of their efforts to prevent it. The better view would seem to be that the obligation is one of diligence only and thus unforeseeable or unavoidable harm may not incur responsibility.²⁵ In conservation cases, the principles of reasonable or equitable use have been employed by international tribunals and the International Law Commission as a basis for determining rights, but the actual allocation of resources invariably requires recourse to negotiation by the parties, supported only by the principle of good faith.²⁶ Likewise, schemes of rational management require agreement and cooperation.²⁷ The high level of generality of

22. *Corfu Channel Case* (1949) I.C.J. Reports 4; 6. G. Handl, "State Responsibility for Accidental Transnational Environmental Damage by Private Persons" (1980) 74 *American Journal of International Law* 525; J. de Arechaga, in, M. Sorensen, *Manual of Public International Law* (London, 1968); Principle 21, Stockholm Declaration on the Human Environment, *supra*, note 4.

23. *Trail Smelter Arbitration*, *supra*, note 16; *Corfu Channel Case*, *supra* note 22; Principle 21, Stockholm Declaration, *supra*, note 4; 1982, U.N. Convention on the Law of the Sea, Arts. 192, 194.

24. *Anglo Icelandic Fisheries Case*, *supra*, note 6; *Lac Lanoux Arbitration*, *supra*, note 17; U.N.E.P. Principles of Conduct Concerning Natural Resources Shared by Two or More States, 1978; 1979 Convention on the Conservation of European Wildlife and Natural Habitats; 1979 Convention on the Conservation of Migratory Species of Wild Animals; 1982 U.N. Convention on the Law of the Sea, Arts. 61, 117.

25. P.M. Dupuy, in O.E.C.D., *Legal Aspects of Transfrontier Pollution* (Paris, 1977), p. 345, *but compare* J. Barboza, (1987) U.N. Doc. A/CN. 4/405, para. 60 and proposed draft articles on international liability, (1989) U.N. Doc. A/CN. 4/423, I.L.C., 41st Session, Arts. 8 and 9, and *see* B. Smith, *State Responsibility and the Marine Environment* (Oxford, 1988).

26. *Anglo-Icelandic Fisheries Case*, *supra*, note 6; *Lac Lanoux Arbitration*, *supra*, note 17; I.L.C. Draft Articles on International Watercourses, 1988, U.N. Doc. A/43/10, Arts. 6,7; 1958 Geneva Convention on Conservation of Fisheries; 1982 U.N. Convention on the Law of the Sea, Arts. 63, 64, 66, 118.

27. 1946 International Convention for the Regulation of Whaling; 1979 Convention on the Conservation of Migratory Animals.

all these customary principles leads to serious uncertainty over the specific obligations of states.

Thirdly, state responsibility is in most cases a principle which may be invoked only by states with standing. In practice this means an injured state, although for this purpose a violation of legal rights, including rights under a multilateral treaty, may be a sufficient injury.²⁸ Where the injury is to the global commons, such as the high seas, states may not on this view have standing to bring proceedings before the I.C.J.²⁹ Since this is a palpably undesirable conclusion where community interests are at stake, the possibility exists that certain environmental obligations may be treated as enforceable by all states, as is now the case in human rights law.³⁰ This would be the main consequence of adopting the International Law Commission's view that "massive pollution of the atmosphere or the seas" is an "international crime."³¹ However, where injury is caused by a state to its own environment, the problem of standing remains a significant one. Thus deforestation or ecosystem destruction with no international effects may remain beyond the existing mechanisms of accountability in international law unless covered by multilateral commitments.

Finally, there are problems with the availability and scope of remedies in cases of state responsibility. It is unclear whether the duty to make reparation covers environmental injury not classifiable as property damage or injury to health.³² Moreover the availability of anticipatory remedies is in doubt following the *Nuclear Tests Cases*.³³

28. I.L.C., Draft Articles on State Responsibility, Part 2, *Report of the I.L.C.*, 40th Session (1988) U.N. Doc. A/43/10, Art. 5; *S.W. Africa Case* (1966) I.C.J. Reports, p. 6, at p.32.

29. See *Nuclear Tests Cases*, *supra*, note 18, at pp. 386-390, per Judge de Castro, but compare Judge Barwick at pp. 437 ff.

30. *Barcelona Traction Case*, *supra*, note 20; J. Charney, "Third State Remedies for Environmental Damage to the Global Commons," in F. Francioni and T. Scovazzi (eds.), *State Responsibility for Environmental Damage* (Dordrecht, 1991).

31. Draft Articles on State Responsibility, Part 1, Art. 19, (1980) II *Yearbook of the I.L.C.*, Pt. 2, p. 30; Part 2, Art. 5, *supra*, note 28.

32. *Trall Smelter Arbitration*, *supra* note 16; *Nuclear Tests Cases*, *supra* note 18; but compare *Cosmos 954 claim*, *supra*, note 19.

33. Compare (1973) I.C.J. Reports 99, at 131, per Judge Ignacio Pinto, and (1974) I.C.J. Reports 253, at pp. 312 ff (joint dissent Dillard, Waldock, Onyeama and de Arechaga).

For injuries to the global commons, states may be confined to diplomatic protest or collective measures.³⁴

But the most pertinent criticism of state responsibility as a model for implementing international environmental law is that by itself it is an insufficient guarantee of adequate standards of environmental protection. Like tort law, it complements, but does not displace the need for a more comprehensive scheme of regulation; such regulation can only come about by agreement. It is for this reason that the growing number of environmental treaties concluded since 1972 is particularly significant.

B. National Law

National law is primarily important as a means of holding individuals to account in environmental cases. Many treaties require implementation in this way, typically by the imposition of criminal penalties. Examples of this include the 1973 MARPOL Convention and the 1972 London Dumping Convention. Fisheries conservation and wildlife protection treaties are similarly enforced by their parties through criminal sanctions. Moreover, in some cases such jurisdiction may be exercised extra-territorially, for example by port states in respect of high seas pollution offences,³⁵ or territorial jurisdiction may be given an extended character for environmental purposes, as in the exclusive economic zone provisions of the Law of the Sea Convention.³⁶

A second role for national legal systems is to provide a means of reallocating transboundary environmental costs and facilitating

34. J. Charney, *op. cit.*, *supra* note 30.

35. 1982 U.N. Convention on the Law of the Sea, Art. 218. Note also Art. 4 of the ILC's Draft Code of Offences Against the Peace and Security of Mankind: "(1) An offence against the peace and security of mankind is a universal offence. Every state has the duty to try or extradite any perpetrator of an offence against the peace and security of mankind arrested in its territory." The articles define "any serious breach of an international obligation of essential importance for safeguarding and preservation of the human environment" as such an offence: see (1986) II *Yearbook of the International Law Commission*, Pt. 2, pp. 41-44, and for examples, see 1977 Additional Protocol 1 to the 1949 Geneva Conventions, Arts. 35, 55.

36. *Id.*, Arts. 56, 211, 220.

transboundary legal action by individual complainants. In this sense, national proceedings operate as a complement or substitute for state responsibility.³⁷

The principle of equal access and non-discrimination developed by O.E.C.D. functions in this way.³⁸ It involves removing jurisdictional obstacles confronting foreign plaintiffs, and enables such plaintiffs to commence administrative or judicial proceedings challenging the legality of environmentally harmful activity or seeking damages in cases of transboundary injuries.

Equal access does not, however, involve harmonisation of legal systems; thus liability in tort will vary according to the substantive legal principles employed by each state. For this reason states have in some cases gone further and established by treaty common schemes of liability, which allow transboundary actions and reciprocal enforcement. Examples of such schemes are found in treaties dealing with nuclear accidents³⁹ and oil pollution at sea.⁴⁰ Apart from the oil pollution scheme, this is not a widely supported approach, nor is equal access commonly found outside Western Europe or North America.⁴¹ In the absence of either feature, reliance on national legal systems in transboundary cases will often be problematic and unproductive.

The human right to a decent environment is a further possible means of holding states accountable in national law for their environmental policies. Principle 1 of the 1972 Stockholm Declaration recognised that "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that

37. A.E. Boyle, "Making the Polluter Pay? Alternatives to State Responsibility in the Allocation of Transboundary Environmental Costs," in Francioni and Scovazzi, *supra* note 30.

38. Principles Concerning Transfrontier Pollution, *supra* note 13; Rec. C(76) 55 (1976); Rec. C(77) 28 (1977), reproduced in *O.E.C.D. and the Environment* (Paris, 1986). See also 1982 U.N. Convention on the Law of the Sea, Art. 235(2).

39. 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy; 1963 Vienna Convention on Civil Liability for Nuclear Damage; see A.E. Boyle, "Nuclear Energy and International Law: An Environmental Perspective" (1989) *British Yearbook of International Law* 286, at p. 297 ff.

40. 1969 Convention on Civil Liability for Oil Pollution Damage, amended 1984. See D. W. Abecassis and R.L. Jarashow, *Oil Pollution from Ships*, 2nd ed. (London, 1985).

41. A.E. Boyle, *supra* note 37.

permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations." A number of constitutions now incorporate such a right, despite obvious problems of definition and uncertainty over whether it has an individual or collective character.⁴² Potentially it presents those living in some developing countries with a claim to have development policies reviewed on environmental grounds. NGOs may also be able to rely on this right.⁴³

C. *International Institutions*

The accountability of states to the members of international organisations is perhaps the most significant approach to implementing international environmental law, drawing on experience in the monitoring of human rights treaties. The key roles which such institutions can perform are those of information and data collection, receiving reports on policy implementation by states, facilitating independent monitoring and inspection, acting as a forum for reviewing the performance of individual states, and negotiating the adoption of further measures.⁴⁴ Such bodies may thus acquire both law enforcement and law-making roles. The International Maritime Organisation is a good example of an international institution which functions in this way, and, through its work, the regulation of marine

42. E.g. Greece, Constitution, Art. 24; Ecuador, Constitution, Art 19; Guyana, Constitution, Art. 36; Rep. of Korea, Constitution, Art. 35 (1); Peru, Constitution, Art. 15; Portugal, Constitution, Art. 9; Spain, Constitution, Art. 45; Turkey, Constitution, Art. 56; India, Constitution, Art. 48(A).

43. P. Sands, "The Environment, Community and International Law" (1989) 30 *Harvard International Law Journal* 393, at 412.

44. A.C. Kiss, "Mechanisms of Supervision of International Environmental Rules" in F. Kalshoven, F. Kuyper and J.G. Lammers (eds.), *Essays on the Development of the International Legal Order*, (Alphen an der Rijn, 1980), p. 99; A. Contini and P. Sand, Methods to Expedite Environment Protection: International Eco-standards, (1972) 66 *American Journal of International Law* 37; Stein, "The Potential of Regional Organisations in Managing Man's Environment," in, J.L. Hargrove (ed.), *Law Institutions and the Global Environment*.

pollution is now highly developed.⁴⁵ Other global bodies such as the International Atomic Energy Authority perform some of these tasks.⁴⁶

At a lower level, most pollution and conservation treaties now make provision for appropriate institutional arrangements to ensure regular meetings of the parties and a review of the operation of the treaty concerned. Examples include the commissions dealing with Antarctic marine living resources,⁴⁷ land-based sources of marine pollution,⁴⁸ dumping at sea,⁴⁹ trade in endangered species⁵⁰ and conservation of migratory animals and wildlife habitat.⁵¹

Apart from the benefits of avoiding enforcement through state responsibility and hostile legal proceedings, such arrangements give treaties a dynamic character and enable the parties to respond to new problems.⁵² The operation of the Antarctic Treaty System is a particularly good illustration of this feature.⁵³ Through periodic review meetings, the parties to this system have negotiated treaties to regulate the conservation of seals,⁵⁴ marine living resources,⁵⁵ minerals exploitation and its environmental impact⁵⁶ and agreed measures to protect flora and fauna on land.⁵⁷ To the extent that the proceedings of these bodies are public and open to representations from interested individuals or NGOs, the accountability of states for their environmental performance is enhanced.

III. Conclusion

45. See, e.g., 1973 Marine Pollution Convention; 1974 Safety of Life at Sea Convention.

46. A.E. Boyle, *supra* note 39.

47. 1980 Convention on the Conservation of Antarctic Marine Living Resources.

48. 1974 Paris Convention for the Prevention of Marine Pollution from Land-Based Sources.

49. 1972 London Dumping Convention; 1972 Oslo Dumping Convention.

50. 1973 CITES Convention.

51. 1979 Convention on the Conservation of Migratory Species of Wild Animals; 1979 Convention on the Conservation of European Wildlife and Natural Habitats.

52. S. Lyster, *International Wildlife Law* (Cambridge, 1985), p. 12.

53. See 1959 Antarctic Treaty, Art. IX; F. Francioni and T. Scovazzi, *International Law for the Antarctic* (Milan, 1987).

54. 1972 Convention for Conservation of Antarctic Seals.

55. See note 47.

56. 1988 Convention on the Regulation of Antarctic Mineral Resource Activities, and see A.D. Watts, (1990) 39 *International and Comparative Law Quarterly* 169.

57. Agreed measures for the Conservation of Antarctic Flora and Fauna, 1964.

The three main approaches to environmental accountability reviewed here all have a role to play in ensuring that environmental obligations are taken seriously and given adequate weight against developmental priorities. Actions for damages or reparation help redirect transboundary environmental costs back to the polluter or the states which allows harmful activities, thus, in economic jargon, internalising the real cost of development.⁵⁸ Criminal penalties control the actions of individual violators and help implement the performance of internationally agreed policies. International organisations help to develop the law and hold states accountable for their performance.

It is perhaps the last of these methods which is the most important, since it represents the international community's primary model for regulation of international environmental risks. Particularly in those cases where the environmental problem is of global character, and no single state's acts are responsible, such as global warming and ozone depletion, this is probably the only solution likely to be effective.⁵⁹ In these cases neither state responsibility nor individual legal actions can have more than peripheral or residual impact.⁶⁰ Thus, in the development of an international legal system capable of meeting the environmental needs of the future in a sufficiently flexible and effective way, the concept of international regulation, and its practical operation, must be the major focus of attention. The problems of reconciling development and environment remain, but as negotiations on a protocol to the Ozone Convention illustrate, here at least is a possible method of effecting this reconciliation.

58. This point should not be exaggerated however: see A.E. Boyle, *Loc. cit. supra* note 37.

59. See, e.g., the 1985 Vienna Convention for the Protection of the Ozone Layer and its 1987 Montreal Protocol.

60. The same point may be true of long-range transboundary air pollution: see M. Pallemmaerts, "International Legal Aspects of Long-range Transboundary Air Pollution" (1988) *Annuaire de La Haye de Droit International* 189, at p. 204 ff.